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No. 211

IN THE

Supreme Court of the United States

W. R. KELLEY, *Petitioner*

VS.

UNION TANK AND SUPPLY COMPANY, *Respondents*

MOTION TO FILE
MOTION FOR REHEARING

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Now comes the petitioner in the above entitled and numbered cause and moves the court to permit him to file this motion for rehearing after the period provided by law has expired and as grounds therefor, would respectfully show unto the court as follows, to-wit:

That since the filing of the Petition For Certiorari has in this cause appellant's counsel have discovered that a new decision has been rendered styled *Ashby vs. Luttrell*, the decision having been published in the advance sheet of the South Western Reporter on September 7, 1948, same appearing in *213 S. W. 2d Pg. 77;* that in said decision the Eastland Court of Civil Appeals has rendered an

opinion which we believe will materially change the opinion of this Honorable Court in that this presents a proposition of law not heretofore urged before this Honorable Court and demonstrates that the opinion of the Circuit Court of Appeals is clearly erroneous wherein the court stated:

> "He, therefore, saw and knew everything that could have been told to him, that if the sheets were straightened up and swung over toward the north wall of the car, and weight, configuration and size were such that if unsupported they would be bound to fall. There was nothing then in the work he was doing and the situation under which he was doing it which was not as fully known to him as to Head, nothing in the work that was inherently dangerous if it was done with reasonable care for the safety of the worker."

In the Ashby v. Luttrell case supra, after the Eastland Court had held in the first opinion that the plaintiff could not recover because the danger was open and obvious, or to use the Court's language on motion for rehearing, the Court said:

> "Such holding was based upon the idea that the evidence showed conclusively that the dangers incident to cleaning the machine were open and obvious to everyone, regardless of experience, and required no warning by appellants. The evidence is susceptible to the interpretation that Luttrell was not given any warning of the danger of having his hand crushed if he failed to hold the scraper with both hands flat on the table. It cannot be said that such danger was open and apparent at all."

In another portion of the opinion, the Court said:

> "It is readily conceivable that such an employee as Luttrell might not know that when the scraper struck a hard piece of dough on the roller while holding the scraper and his hands in such a position, that his left hand might be thrown between the rollers. This is quite a different thing from knowing and realizing merely that if he got his hand between the rollers it would be crushed. The same idea was expressed by Judge Strong in Hotel Dieu v. Armendarez, 210 S.W. 518."

The court further cited the case of *City of Waco v. Dool*, 254 S.W. 353, in which case an employee who knew that it was dangerous to handle dynamite returned to the spot where he had lighted a fuse on a stick of dynamite after it had failed to explode within the usual time and was injured by a delayed explosion caused by a slow burning fuse. There was evidence that Dool did not know that some fuses burned more slowly than others; that the defendant failed to warn him; that if he had been so warned he would have waited longer before going to the ditch and would thereby have avoided the injury. The court held that the question of whether the defendant was negligent in failing to so warn said employee was for the determination of the jury.

The court quoted from 35 Am. Jur. 576 as follows:

> "Comprehensively stated, the rulings of the cases are to the effect that if a person employs another to do work of a dangerous character or in a dangerous

> place, and the employee, because of youth, ignorance or inexperience, fails to appreciate the danger, it is a breach of duty and negligence on the part of the employer to expose him thereto, even with his consent, unless the employer first gives him such instruction, caution and warning as will enable him to comprehend the danger and do his work safely with the exercise of proper care on his part, citing the Texas cases of Missouri Pacific Ry. Co. v. Watts, 64 Tex. 568; Galveston, H. & S. A. R. Co. v. Garrett, 73 Tex. 262, 13 S.W. 62; Chicago Anderson Pressed Brick Co. v. Reinneiger, 140 Ill. 334, 29 N. E. 1106, 33 Am. St. Rep. 249; Texas & N. O. R. Co. v. Gardner, 29 Tex. Civ. App. 90, 69 S.W. 217."

We have heretofore quoted in our original Petition For Certiorari that it is the settled law in Texas that an invitee such as Kelley was entitled to this type of warning and Judge Holmes, in his dissenting opinion, clearly so holds. The evidence set out by the court shows, in the footnotes of the original opinion, on Page 814;

> "They had nailed the steel. It is back in the car, and I had gone back to pull this nail out of this sheet of steel, coming to the front end of the car. Before I got to the front the steel fell and lodged me against the opposite side of the car."

There is absolutely no testimony showing that any warning of any character was ever given to Kelley. Certainly Kelley was entitled to be told that pulling the nail out of the sheet of steel at the back as he *had been doing might eventually result in the entire stack falling. There is absolutely no evidence showing that he was given such a warn-*

ing that would make him, as an inexperienced employee, comprehend and appreciate his danger. Therefore, the court obviously erred under the above holding in *holding that the danger was obvious and apparent to Kelley.*

Petitioner would further show this Honorable Court as grounds for granting this motion to file this motion for rehearing out of time that he has discovered a case by the Supreme Court of the United States, to-wit: *Donatto Fillippon v. Albion Vein Slate Company,* 63 Law Ed. 76. In the above case this Honorable Court granted a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit to review a judgment of said court which affirmed a judgment of the District Court for the Eastern District of Pennsylvania in favor of the defendant in a personal injury case. This Honorable Court in an opinion by the great Mr. Justice Pitney reversed and remanded the proceedings of the lower courts upon two propositions, *one of which was an erroneous charge upon the question of contributory negligence. This was a case very similar to the facts in this case* and in which the grounds of negligence alleged were the failure to furnish a reasonably safe place for the work to be performed and the failure to warn plaintiff of the latent dangers of the work and the dangerous method of doing the work and specifically, that plaintiff was directed to do the work in a particular manner under orders and instructions of the defendant's foreman. The evidence showed that the plaintiff was at work in an open quarry and that the usual method of work with which the

plaintiff was familiar was that after a block of slate had been blasted out it was raised by crowbars and by wedges of wood or iron placed beneath it, in order that chains might be placed about it to which the hoisting tackle is made fast. To use the language of the Court:

> "In case the block is small, the wedges are placed by the workman's hand, it not being necessary to insert them beyond the edge of the block. In case of large blocks, the wedges are put in by hand so far as this can be done without placing the hand beneath the block, and then a stick or the handle of a tool is employed in order to push the wedge farther in, the workman being thus protected from injury in case the stone should happen to slip or drop.

The court further said:

> "On the occasion in question a large block had been blasted out and was being raised in order that chains might be put about it. Plaintiff was assisting, and had inserted a wedge as far as he could push it without putting his hand beneath the stone, but it was necessary that the wedge should be pushed farther in, and he, being afraid that if he did this with his hand the block might fall upon his arm, told the foreman or superintendent that he wanted to get something with which to push the wedge. Instead of consenting, the foreman ordered him to 'go ahead, go ahead,' in in obedience to this he put his right hand beneath the block, when, with a sudden movement, the block came down on his arm and crushed same."

The Supreme Court held the trial court's instruction to the jury was erroneous in the following language:

"But this was neutralized, and the jury probably led astray, when, in the supplementary instruction, they were told, in effect, that if, when plaintiff obeyed the foreman's order by putting the wedge beneath the heavy block of slate with his hand, he fully appreciated the attendant dagner and had sufficient time to consider, and if the situation was such as would have made a reasonably prudent man disobey the order, and he went ahead in spite of the dangers known to him and apparent, he was guilty of contributory negligence. The effect of this was to bar a recovery if the plaintiff knew of the attendant danger, although he did not know or have reason to suppose that the danger was inevitable or imminent; that is, immediately threatening. We suppose it hardly could have been a point in dispute that plaintiff knew that the operation of pushing the wedge beneath a large block of slate with his hand was dangerous, for he was familiar with the work, knew what safeguard was customarily taken against this danger, expressed a fear of it upon the particular occasion, and requested time to get an implement to be used for his safety according to the custom. It was at this precise moment, according to the testimony, that the foreman or superintendent told him to 'go ahead, go ahead;' and under the Pennsylvania decisions he was entitled to rely upon the judgment and order of his superior if the work was not inevitably and imminently dangerous; this is, threatening immediate injury upon the particular occasion. The jury very reasonably might conclude that neither plaintiff nor the foreman believed or had reason to believe that the work was inevitably and imminently dangerous; but if it was not, he was entitled, under the Pennsylvania decisions, to hold his employer re-

> sponsible for the consequences of what he did under peremptory orders of the foreman, although he (the plaintiff) fully appreciated the general dangers, had time to consider, and went ahead notwithstanding."

This case is clearly in point with the fact situation in the case at bar. This decision demonstrates the duty of this Honorable Court to follow the action of the great Court that constituted the Supreme Court of the United States at the time that the brilliant Mr. Justice Pitney delivered this opinion *since it clearly shows that this Honorable Court has a duty in a case involving this exact point of law to grant the application for certiorari and to review the horribly wrong decision, the plainly palpable errors made by the majority opinion of the Fifth Circuit in which a $32,000.00 judgment has been taken from a man whose bowels must forever empty from an opening in his stomach.* The Fifth Circuit in the majority opinion is plainly wrong when they say:

> "As to the first exception, there is no evidence whatever that Head, who for defendant employed Wimberly, plaintiff's employer, in any manner interfered with the contractor in the discharge of his work. The fact that he told Wimberly that the steel must be gotten out that night was not an interference with the contractor in the doing of the contracted work. It was merely the expression of a desire which was neither unlawful nor unreasonable."

The evidence of Head shows, from Page 106 of the Record, that he went by at 7:30 P. M., when it was getting

dark and after the work had already been contracted and then, to use his exact language:

> "I stopped by to see how they was getting along, *and they lacked a load of staves having them out, and I told them to go ahead and finish them.*
>
> Q. About what time?
>
> A. As well as I remember around 7:00 or 7:30
>
> Q. Was it dark then?
>
> A. Beginning to get dark in the car, yes, sir.
>
> Q. Did they have any lights in the car?
>
> A. No, sir, we didn't have no lights."

This, we respectfully submit, amounts to an order to go ahead even though the work was dangerous, and was rendered far more dangerous by the order of Head to do it in the nighttime. In fact, the Courts of Texas, whose law must control here, the accident having occurred in Texas, have many times *held that such orders constitute negligence.* Another case which has not been presented to this Honorable Court or to the Fifth Circuit concerning this matter is that of *Texas Hardwood Co. et al v. Moore,* 235 S.W. 630. In the Moore case the plaintiff was told by the man in charge of the work to push the log car so that it would return to the log yard, and was injured. This was held to *constitute active negligence.* In another Texas case not heretofore quoted before either court, *Dillingham v. Cavett,* 91 S.W. (2) 868, the manager of an ice company placed a block of ice into a machine which was

running and told the youthful employee, "you push them in and I will take them out." The boy did as directed and received a serious injury and this was held to *constitute active negligence.*

In the case of *Page v. Schlortt, et al,* 71 S.W. (2) 866 the facts were that the plaintiff was ordered, with other employees, *to get upon a scaffold.* The scaffold fell and the Court held that such an order constituted *an affirmative act of negligence.* Such a holding by the majority is clearly contrary to Section 410 of the Restatement of the Law of Torts, another Section of the law which has not heretofore been quoted either to this Honorable Court or to the Fifth Circuit, wherein said Section says:

> *"The employer of an independent contractor is subject to the same liability for bodily harm caused by an act or ommission committed by the contractor pursuant to the orders or directions negligently given by the employer, as though the act or ommission were that of the employer himself."*

Under Comment (a), it is stated:

> "The rule stated in this Section is an application of the broader rule that one who either intentionally or negligently directs another to do or omit to do an act, is subject to the same liability for the consequences of the other's act or omission as though it were his own. This Section deals only with the liability for the conduct of an independent contractor. The broader rule, however, is equally applicable to a servant or agent or to any other person who acts or refrains from action in obedience to the will of

another. This section deals with the liability for negligence in directing work to be done which is dangerous in itself or dangerous because of the manner in which it is directed to be done. The broader rule includes liability of one who intentionally causes a third person to inflict intended bodily harm upon another.

Under Comment (b) Extent of rule, it is further stated in the Restatement of the Law of Torts:

> "This Section deals only with liability of an employer who does not intend that the contractor shall cause bodily harm to any other person, but who either employs a contractor to do work which, no matter how carefully done, involves an unreasonable risk of bodily harm to others to whom he owes a duty to exercise care, or who employs a contractor to do work which could be safely done but for the fact that he directs the contractor to do it in a manner involving such risk. The liability is based upon the fact that the employer has been negligent in directing his contractor to do work which is dangerous in itself or in the manner in which it is done."

Who can say that directing a contractor to work in the nighttime without lights in a car which the employer of the contractor knows presents a false appearance of safety to an inexperienced employee knows that he is in danger in that Head admits having removed the supports and crating and knew that some of the sheets of steel had already fallen in the car, was guilty of negligence in direcing this contractor to do the work without lights in the nighttime under such circumstances. To our mind the

proposition is unheard of *and when reasonably considered, shows how right Mr. Justice Holmes was in his dissenting opinion when he pointed out that there was liability in this case, not only in the failure to warn but on account of the interference of the company with the contractor's work.*

WHEREFORE, it is respectfully submitted that this motion for leave to file the attached motion for rehearing should be granted and upon being granted that this Honorable Court should set aside the judgment of the majority of the United States Circuit Court of Appeals for the Fifth Circuit and that the judgment of the United States District Court in and for the Western District of Texas, Pecos Division, should be affirmed. In this connection your petitioner would show that this motion is filed in good faith and not for the purpose of delay.

Petitioner further represents that this motion is made in good faith and not for the purpose of delay.

Respectfully submitted,

JOHN W. WATTS and DORSEY HARDEMAN

By.....

P.O. Box 1031, Odessa, Texas

Attorneys for the Petitioner

A true and correct copy of this motion for leave to file the attached Motion For Rehearing has been furnished counsel for the adverse parties.

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Attorneys for Petitioner

No. 211

IN THE

Supreme Court of the United States

W. R. KELLEY, *Petitioner*

VS.

UNION TANK AND SUPPLY COMPANY, *Respondent*

To the Honorable Fred, Vinson Chief Justice, and to the Honorable Associate Justices of the Supreme Court of the United States.

MOTION FOR REHEARING

Now comes the Petitioner in the above entitled and numbered cause and files this his motion for rehearing and moves this Honorable court to set aside his judgment rendered on October 11, 1948, refusing Petition For Certiorari in this cause, and moves the court to grant this motion for rehearing and as grounds therefor, shows that this Honorable Court erred in refusing to grant said petition under the law as expressed in *Ashby v. Luttrell*, 213 S.W.

2d Page 77. And as expressed in the decision discussed in the motion for leave to file this motion for rehearing.

WHEREFORE, petitioner prays that this motion for rehearing be granted; that the Petition For Certiorari be granted and that upon final hearing that the majority opinion of the United States Circuit Court of Appeals for the Fifth Circuit be reversed and the judgment of the United States District Court in and for the Western District of Texas, Pecos Division, be affirmed.

Respectfully submitted,

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Odessa, Texas

A true and correct copy of this motion for rehearing has been furnished counsel for the respondent.

By.....
Of Counsel for Petitioner.